Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No. 96-1042

In The

Supreme Court of the United States

October Term, 1996

WENDELL M. SIMMONS and LUCY SIMMONS,

Petitioners,

vs.

SAFECO INSURANCE COMPANY OF AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

All parties to the proceedings in the court below are listed in the caption to this petition. There are no parent companies or nonwholly owned subsidiaries of respondent Safeco Insurance Company of America, Inc.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

The Simmonses filed this action for breach of contract and the tort of bad faith denial of their insurance claim. The trial resulted in a verdict in favor of the Simmonses on both claims.

After the trial, Safeco satisfied the breach of contract judgment, so it was not at issue on appeal. Record 6-309-12; 9-1057.

As to the tort claim for bad faith, the district court granted Safeco's motion for judgment notwithstanding the verdict, setting aside the $2,000,000 punitive damages verdict. That action was affirmed by the Eleventh Circuit, and the Simmons' application for rehearing was denied.

The Simmonses never raised the issues for review alleged here until their application for rehearing in the Eleventh Circuit.

B. Factual Background.

On November 26, 1992, a home owned by Wendell Simmons burned. Record 6-263. The Simmonses made a claim under their homeowners policy with Safeco. The fire was unquestionably arson. Record 6-321, 7-570. Accordingly, Safeco began an investigation of the loss. Record 8-691.

During its claim investigation, Safeco discovered evidence that in applying for the policy the Simmonses had misrepresented or omitted material information. Record 6-298, 332-34. The misrepresentation was that the Simmons' homeowners coverage had not been non-renewed by another company within the past five years. *Id.*

Safeco's application for the policy asked, "7. Has any company canceled, declined, or refused to renew similar insurance to the insured within the past 5 years?" Record Pl. Ex. 3, 6-298, 323-34, 8-715, 749-52. The question was answered, "no." *Id.* The insurance agent testified she asked Ms. Simmons this question and accurately recorded her answer, *id.*; Ms. Simmons denied the agent asked the question, *id.* at 648.

The truth was that the Simmons' current homeowner's insurer, Southern Guaranty, had refused to renew their homeowners policy because of Lucy Simmons's bankruptcy and adverse financial standing. Record 6-298, 332-34. Had Safeco known of this adverse information, it would not have issued the policy. Record 7-467, 470, 480. Therefore, Safeco denied the claim, rescinded the policy, and refunded the premiums based on the misrepresentation of material fact concerning the non-renewal question on the application. Record 7-470.

Safeco's claim investigation included, among other things, obtaining statements from Lucy Simmons, the insurance agents, and Southern Guaranty, the Simmons' prior homeowner's carrier. Record 6-298, 332-34. The agent confirmed she had asked the questions on the application. Record 6-298, 323-34, 8-715, 749-52. Southern Guaranty confirmed it had non-renewed the Simmons' policy because of their bad credit and the bankruptcy. Record 6-298, 323-34; 8-827-29, 831.

Lucy Simmons, however, misrepresented this latter fact to Safeco in its claims investigation. The Simmonses introduced the testimony of Safeco's claim adjuster, Passomato. Passomato testified that Lucy Simmons told him they were seeking to change insurance companies because their current carrier was requiring them to erect a fence around their swimming pool, which they had chosen not to do. Record 6-294-97. Passomato's

claim note of Lucy Simmons' statement, also introduced by the Simmonses, states in part:

> *I* [Lucy Simmons] *was looking to change ins[urance] co[mpanies] because my carrier wanted me to put a fence around the pool* or they would not cover me. I spoke with Wendell & he said I have 160 acres & I'm not going to put a fence up. *So we were looking to change companies* & I was asked some questions. Age . . .
>
> She [the agent] did not ask about being cancelled or not renewed. But we did discuss the problem about the fence and that the other carrier would not cover me w/o fence.

Record Pl. Ex. 41, 6-294-99 (emphasis added).

Passomato knew Lucy Simmons's statement was false, because he had already been told by Southern Guaranty of the non-renewal for bad credit and the bankruptcy. Record 6-298, 323, 333. Moreover, Southern Guaranty had reported to Passomato that it had told Lucy Simmons the reason for Southern Guaranty's non-renewal. *Id.* The agent did not agree that Lucy Simmons had told her about any non-renewal concerning a swimming pool fence. Record 6-298, 323-34, 8-715, 749-52. Thus, Passomato had evidence that Lucy Simmons misrepresented facts to the agent in applying for the policy, and he had the direct experience of Simmons misrepresenting facts to him.

Passomato forwarded the information about the misrepresentation in the application to Safeco' underwriting

department. Record 6-334; 8-694. The underwriting department advised that no policy would have issued had Safeco known of the non-renewal by Southern Guaranty for bad credit and bankruptcy. Record 7-467. The underwriter testified, "Our experience as a company is that there is a much higher probability of loss and much more costly losses if an individual has severe credit problems." Record 7-467, 480; 8-851-52. Passomato then denied the claim because of the material misrepresentation on the application as to the non-renewal question. Record 6-289; 9-882.

REASONS FOR DENYING THE WRIT

This case involves only the question of the sufficiency of evidence for submission to the jury of plaintiffs' bad faith claim. The district court granted a judgment n.o.v., because it determined there was insufficient evidence to have submitted that claim to the jury. The case does not present an important question of federal law, nor does the decision conflict with any other decision by a court of appeals or this Court.

Contrary to the Simmons' assertions, the district court did correctly apply Alabama law, as is shown below.

I.

UNDER ALABAMA LAW A BAD FAITH CLAIM CANNOT BE SUBMITTED TO THE JURY WHEN THE INSURER HAD A DEBATABLE REASON TO DENY THE CLAIM.

The tort of bad faith is an intentional tort under Alabama substantive law. A plaintiff bears a "heavy burden" to prove a bad faith case. Alabama law recognizes that an insurer should have the right to contest questionable claims: "The reasonable

expectations of parties to an insurance contract contemplate a broad range of freedom on the part of the insurer to evaluate claims submitted thereunder and to decline payment in non-meritorious cases;" an insurer has a "freedom (and, perhaps, the duty) not to honor, and thus legally dispute, claims of questionable validity in accordance with the terms of the contract . . . ." *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054, 1063 & 1064 (Ala. 1979) (Jones, J., concurring).

A plaintiff must prove, in addition to other elements, that the insurer both (1) had no lawful basis to deny the claim and (2) knew it had no arguable basis for the refusal to pay at the time it denied the claim. *National Security Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982). The *Bowen* court explained:

> No lawful basis means that the insurer lacks a legitimate or arguable reason for failing to pay the claim . . . . When a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law.

Id. A bad faith claim is to be dismissed where there is a lawful basis:

> As a general rule, when a fact issue exists as to the validity of the insurance claim, the bad faith claim should not be submitted to the jury and summary judgment for the defendant is proper. . . . If any one of the reasons for denial of coverage is at least "arguable," [the] Court need not look any further.

Sherrin v. Northwestern Nat. Life Ins. Co., 2 F.3d 373, 380 (11th Cir. 1993) (Alabama).

The premise of the tort of bad faith is that the trial judge makes a threshold determination whether the insured has met the heavy burden of showing there was no reasonable evidence to support the insurance company's denial of the claim. If *any* reasonable evidence existed, the trial judge is to dismiss the bad faith tort claim:

> In *Bowen, supra*, we set out the elements of the tort and attempted to show the plaintiff's burden in these cases. It is a *heavy burden*. In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. *Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.*

National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982) (emphasis added). "[T]he 'no lawful basis' element of the tort constitutes the insurer's utter lack of any 'legitimate or arguable reason for failing to pay the claim.' " *Burns v. Motors Ins. Corp.*, 530 So. 2d 824, 827 (Ala. Civ. App. 1987).

A bad faith claim is to be dismissed where there is evidence of a lawful basis regardless of the ultimate determination at trial

on the breach of contract claim. *See, e.g., Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354, 360 (Ala. 1992); *Lamplighter Dinner Theatre v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1041-42 (11th Cir. 1986) (Alabama) (summary judgment on bad faith affirmed where insurer had arguable reason for denial, even though insurer had settled and paid the policy claim).

II.

A MATERIAL MISREPRESENTATION BY THE INSURED IN APPLYING FOR THE POLICY IS A DEBATABLE REASON UNDER ALABAMA LAW.

Ala. Code § 27-14-7 (1975) authorizes an insurer to rescind a policy for material misrepresentations, concealments, or incorrect statements by the insured in applying for a policy.[1]

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1. That code section provides in pertinent part:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or . . . at the premium

(Cont'd)

Under Alabama law, evidence of a misrepresentation by the insured in applying for a policy is a lawful basis to deny a claim. This rule applies even when there is a factual dispute whether the insured misrepresented information to the agent. In each of the following cases, a factual disputed existed between the insured and the agent as to the reason for the misrepresentation on the application, yet the misrepresentation was held to be a debatable reason not to pay which precluded submission of the bad faith claim to the jury: *Sherrin v. Northwestern Nat. Life Ins. Co.*, 2 F.3d 373 (11th Cir. 1993) (Alabama) (insurer granted directed verdict); *American General Life & Acc. Ins. Co. v. Lyles*, 540 So. 2d 696, 699 (Ala. 1988) (reversed for failure to grant insurer a directed verdict on bad faith: "[w]hether Mr. Lyles told the agent the truth and the agent omitted the information is in dispute, but an insurer has a right to expect applicants for insurance policies to tell the truth .... Thus, it was error to submit the bad faith claim to the jury."); *Union Bankers Ins. Co. v. McMinn*, 541 So. 2d 494 (Ala. 1989) (reversed for failure to grant insurer directed verdict where application omitted health history even though there was conflicting evidence that agent may have been responsible for the omission); *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982) (insurer entitled to directed verdict); *Old Southern Life Ins. Co. v. Spann*, 472 So. 2d 987 (Ala. 1985) (insurer due directed verdict for misrepresentation on application); *Kizziah v. Golden Rule Ins. Co.*, 536 So. 2d 943 (Ala. 1988) (summary judgment affirmed on bad faith); *McLaughlin v. Alabama Farm Bureau Mut. Cas. Co.*, 437 So. 2d 86 (Ala. 1983) (insurer due directed verdict);

(Cont'd)

> rate as applied for, or . . . in as large an amount or . . . for the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Ala. Code § 27-14-7 (1975).

Clark v. Alabama Farm Bur. Mut. Cas. Ins. Co., 465 So. 2d 1135 (Ala. Civ. App. 1984) (insurer entitled to summary judgment on bad faith claim); *National Security Fire & Cas. Co. v. Vintson*, 454 So. 2d 942 (Ala. 1984) (insurer had a lawful basis).

III.

THE EVIDENCE WAS INSUFFICIENT FOR SUBMISSION OF BAD FAITH TO THE JURY.

Safeco discovered evidence in its claims investigation that the Simmonses had misrepresented in applying for the policy that they had not been non-renewed by another insurer within the past five years. The truth was that the Simmons' existing carrier had non-renewed them because of a bankruptcy and bad credit. Had Safeco known the true facts originally, it would not have issued the policy.

At the time Safeco denied the claim, which is the material time in a bad faith claim, Safeco had evidence from independent sources that Lucy Simmons knew Southern Guaranty had non-renewed them, but she misrepresented or concealed that information from Safeco in applying for the policy. That evidence constitutes a lawful basis — a fairly debatable or arguable reason — for the claim denial, and the district court correctly granted a n.o.v. on the tort of bad faith claim. *See Sherrin*, 2 F.3d 373; *State Farm Fire & Cas. Co. v. Balmer*, 891 F.2d 874 (11th Cir. 1990) (Alabama).

The Simmons' attempt to find a federal issue is transparent. The district court correctly followed Alabama law in granting the judgment n.o.v. The court simply ruled that the evidence was insufficient under Alabama law for submission of bad faith to the jury. The writ is not to be issued merely to review a question of the sufficiency of the evidence. *General Talking*

Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

The district court did not base its ruling on public policy, nor did it violate the *Erie* Doctrine by refusing to apply Alabama law. This case does not satisfy the grounds for issuance of the writ under Supreme Court Rule 10, and the petition should be summarily denied. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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